

Atty Gen. Op. No. 10-1810

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September 8, 2010

Mr. Randall Chase  
The Associated Press  
P.O. Box 934  
Dover, DE 19903

**RE: Freedom of Information Act Complaint  
Against Appoquinimink School District**

Dear Mr. Chase:

On July 16, 2010, the Delaware Department of Justice ("DDOJ") received your email alleging the Appoquinimink School District ("District") had violated the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA"), in refusing to provide you with public records. On the same date, we emailed your complaint to the District's attorney, requesting a response on or before July 26, 2010. We received no reply from the District, but on August 17, 2010, the District did reply to our request for further information.

#### **RELEVANT FACTS**

On May 28, 2010, you requested the District provide you with the following records:

1. The settlement agreement between the parties to *Bd. of Educ. of the Appoquinimink Sch. Dist., et al. v. SQJ, V, et al.*, D. Del., C.A. No. 06-770-JJF.
2. All attachments, amendments, memoranda supplements and supporting documents to that settlement agreement.

3. All emails between one of the defendants to that action, Julie Johnson, and "district administrators," their agents and representatives regarding that civil action.
4. All emails between district administrators, their agents and representatives and the "other members of the school board" and their agents and representatives regarding that civil action.
5. All emails between Julie Johnson and "other members of the school board" regarding that civil action.

The civil action between the District and the Johnsons was an appeal of an administrative panel's decision that the District pay for a sign language interpreter for the Johnsons' deaf son ("Student"), if the Student left the public system to attend a private school. Summary judgment was granted in the District's favor, and the Johnsons appealed. The appeal was dismissed by agreement of the parties.

The District refused to provide the records you requested, on the grounds it has no records responsive to item 5, and items 1-4 are "educational records" that are confidential under both federal and state law, citing the Family Educational and Privacy Act ("FERPA") and 14 *Del. C.* § 4111. In addition, the District claims that item 4 requests records protected by attorney client and attorney work product privileges.

### **RELEVANT STATUTES**

The Delaware Freedom of Information Act was enacted to so that "citizens have easy access to public records in order that the society remain free and democratic."<sup>1</sup> 29 *Del. C.* § 10001. FOIA requires that the public must have "reasonable access to" public records for "inspection and copying." 29 *Del. C.* § 10003(a). FOIA excludes from the

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<sup>1</sup> While FOIA refers throughout to "citizens,"-restricting the rights created by FOIA to only citizens of Delaware has been held unconstitutional. *Lee v. Minner*, 458 F.3d 194 (2006). Therefore, we will use the term "public" rather than "citizens."

definition of “public record” “[a]ny records specifically exempted from public disclosure by statute or common law. 29 *Del. C.* § 10002(g)(6).

FERPA provides that federal funds will be denied to any educational entity that has a “policy or practice” of releasing “any personally identifiable information in education records” without the written consent from a minor student’s parents. 20 U.S.C. § 1232g(b)(2). “Education records” are any materials that “contain information directly related to a student” and that “are maintained by an educational agency or institution . . . .” 20 U.S.C. § 1232g(a)(4)(A). The Individuals with Disabilities Education Act (“IDEA”), also requires states receiving federal assistance to have policies and procedures for keeping education records confidential.<sup>2</sup> 20 U.S.C. § 1412(a)(8). As under FERPA, IDEA provides that education records may be disclosed with parental consent. 34 C.F.R. § 300.622(a).

Section 4111(a) of title 14 of the Delaware Code provides that student “education records” are confidential, and may only be released in accordance with regulations of the Department of Education. Those regulations incorporate FERPA and its implementing regulations. 14 *Del. Admin. C.* § 251.

### **DISCUSSION**

FOIA provides that records protected from disclosure by statute are not public records. 29 *Del. C.* § 10002(g)(6). FERPA provides that education records may not be disclosed unless the parents consent. Therefore, records as to which the parents give their consent are not protected by statute, and are public records under FOIA. In this case, the District does not appear to have sought the Johnsons’ consent to provide you copies of

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<sup>2</sup> IDEA defines “education records” as defined in FERPA. 34 C.F.R. § 300.611(b).

what the District considers confidential education records. If the Johnsons consent to the release of the requested records, the issue of which records are properly excluded as education records becomes moot. If the Johnsons do not consent, then all records the District deems to be education records must be submitted to this office for confidential review so that we can determine which records, or parts thereof, are education records within the meaning of FERPA.

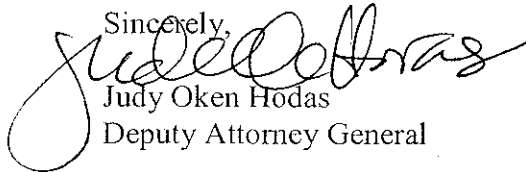
The District cites *Wittenberg v. Winston/Salem County Bd. of Educ.*, 2009 WL 1684585 (M.D.N.C. June 16, 2009) as support for its contention that an agreement settling litigation over an educational issue is *per se* an education record. However, that case is not precedent for such a blanket exclusion, because 1) in that case the identity of the student was not already a public record, as it is here,<sup>3</sup> and 2) the court, after reviewing the settlement agreement, concluded that release of the agreement would violate the student's right to the privacy of his education records. If the Johnsons do not consent to release of the records, then we will need to review them to determine whether disclosure would violate FERPA.

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<sup>3</sup> The Johnsons waived their FERPA right of nondisclosure in the civil action, so all documents filed in the civil action are public. However, none of the records you request were filed in the civil action, so the Johnsons' waiver in that case has no application to your request.

**CONCLUSION**

Within 7 days of this determination, the District shall forward to the Johnsons a request for their written consent to the release of the records requested in items 1-4, as provided in 20 U.S.C. §1232(g)(2)(A). If the Johnsons do not consent by September 10, 2010, the District shall then provide the records to this office for review.

Sincerely,  
  
Judy Oken Hodas  
Deputy Attorney General

Approved:   
Lawrence W. Lewis, State Solicitor

cc: Opinion Coordinator  
Michael P. Stafford, Esquire